

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TOBY HARRIS et al.,

Plaintiffs and Appellants,

v.

INVESTOR'S BUSINESS DAILY, INC.,
et al.,

Defendants and Respondents.

B178428

(Los Angeles County
Super. Ct. No. BC269313)

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT*

It is ordered that the published opinion filed March 29, 2006, be modified as follows:

1. On page 5, a footnote is inserted after the second sentence of the first full paragraph to read:

³. The court requested letter briefs on whether preemption is applicable to the named plaintiffs. Since we have decided that preemption does not apply, we need not specifically address that further issue.

2. On page 11, the first full paragraph is deleted and the following two paragraphs are inserted in its place:

Respondents also argue that whether the points constitute commission payments is a question of law because the facts describing the point system are undisputed. They contend that the only contested issue is the interpretation of Labor Code section 204.1. We agree with respondents that if the facts are undisputed, the conclusion is a question of law. Respondents presented a chart showing that points are based on the type of subscriptions sold. There was no showing that the points are tied to a particular price. A six-month subscription may result in more points than a one-year subscription, but there is no evidence that all subscriptions for the same period are sold at the same price. As we have seen, Barron's declaration demonstrated that points received from bonuses, subscriptions, and sales contests were not based on the price of the subscriptions. Further, a DMSI sales manager testified that he did not know of any IBD commission schedule that awarded points based on the price of the subscription.

Applying de novo review, we conclude that the payments received by the employees did not constitute commissions. Our adjudication is, of course, determinative that, based on the materials before the court on summary judgment, the commission exemption does not apply in this case. (See *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 18-19; see also *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309-313; cf. *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108.)

3. On page 11, the first sentence of the second full paragraph is modified to read:

Even if the point system as described in the summary judgment papers did constitute commissions, respondents would still fail on summary judgment because they did not demonstrate, as a matter of law, that more than half of the employees' compensation was from commissions. (*Ramirez, supra*, 20 Cal.4th at p. 794.)

4. On page 11, the first sentence of the third paragraph is modified to read:

Nor were respondents able to demonstrate, as a matter of law, that the employees' total compensation was more than one and one-half times the minimum wage. (Cal. Code Regs, tit. 8, § 11040, subd. 3(D).)

There is no change in the judgment.

Respondents' petition for rehearing is denied.

*EPSTEIN, P. J.

CURRY, J.

HASTINGS, J.**

**Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.